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No. 86-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES MCKINNEY,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

On Petition For A Writ of Certiorari
To The Missouri Court Of Appeals
For The Eastern District

SUPPLEMENTAL BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

Whether the Missouri Pornography Statute is unconstitutional on its face, in light of *Pope v. Illinois*, ____ U.S. ____, 55 U.S.L.W. 4595 (No. 85-1973, May 4, 1987).

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ARGUMENT

I. The Missouri Pornography Statute Is Unconstitutional On Its Face In That It Requires That The Value Of A Work Be Judged By Contempory Community Standards, Not Objective Standards, As Required By *Miller v. California,* 413 U.S. 15 (1973), And Clarified By The Recent Decision Of *Pope v. Illinois,* ____ U.S. ____, 55 U.S.L.W. 4595 (No. 85-1973, May 4, 1987).

After filing Petitoner's petition for writ of certiorari in this case, This Honorable Court issued the decision of *Pope v. Illinois,* on May 4, 1987. The *Pope* decision clarified the *Miller v. California* decision and is critical to the decision in the case at bar.

The *Pope* case dealt with obscenity convictions of two adult bookstore clerks in Illinois. The juries in those cases were instructed that, to convict, they must find the magazines to be without value and were also instructed to judge whether the material was obscene by determining how it would be viewed by ordinary adults in the whole state of Illinois. The Illinois appellate court had rejected the defendants' contention that the "value" issue must be determined by an objective basis and not by reference to "contemporary community standards." This Honorable Court vacated and remanded for a determination by the Illinois Court of Appeals whether the legally incorrect instruction constituted "harmless error."

In its decision, this Court stated that "The third prong of the *Miller* test requires the trier of fact to determine 'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,' " 413 U.S. 24, but that such a determination must be made by referring to an *objective* standard and *not* a standard based on contemporary community values. In the slip opinion at pages 2 and 3, this Court stated:

> "There is no suggestion in our cases that the question of the value of an allegedly obscene work is to be determined by reference to community standards. Indeed, our cases are to the contrary. *Smith v. United States,* 431 U.S. 291 (1977), held that, in a federal prosecution for mailing obscene materials, the first and second prongs of the *Miller* test — appeal to prurient interest and patent offensiveness — are issues of fact for the jury to determine applying contemporary community standards. The Court then observed that unlike prurient appeal and patent offensiveness, "literary, artistic, political, or scientific value ... is not discussed in *Miller* in terms of contemporary community standards." (431 U.S. 301-302).... This comment was not meant to point out an oversight in the *Miller* opinion, but to call attention to and approve a deliberate choice....

> The proper inquiry is not whether an ordinary member of a given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."

This Court did not facially invalidate Illinois' statute because the statute under which the clerks were convicted was no longer on the books, having been replaced with a statute that does *not* call for the application of community standards to the value question, and so, presumably, is constitutional. See, Ill. Rev. Stat., Chap. 38, Par. 11-20(b) (1985) (effective January 1, 1986), which statute provides in relevant part:

> "Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, intimate sexual acts or sado-masochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibitions of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political, or scientific value."

The case at bar, however, was tried under the Missouri Pornography Statute, which defines pornographic, in Section 573.010(1), R.S.Mo., as follows:

> "any material or performance is 'pornographic' if, considered as a whole, *applying contemporary community standards:*
>
> (1) Its predominant appeal is to prurient interest in sex; and
>
> (2) It depicts or describes sexual conduct in a patently offensive way; and
>
> (3) It lacks serious literary, artistic, political or scientific value.

> In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults." (Emphasis supplied).

The definition of pornography is applicable to Section 573.030, R.S.Mo. under which Petitioner in this case was convicted.

The difference between Illinois' statute and Missouri's is apparent. Illinois' statute, presumably constitutional, does not apply contemporary community standards to the third prong, the value test. However, reading Missouri's statute, it is clear that the phrase "applying contemporary community standards" modifies *all three* parts of the test, including part (3), the "value" section. Thus, on its face, the statute contravenes *Miller* and, according to the *Pope* decision, is unconstitutional.

Although this issue was not raised in Petitioner's Petition for Writ of Certiorari, it is within the jurisdiction of this Court to consider such an important issue under the plain error doctrine, under Supreme Court Rule 34.1(a). *Vachon v. New Hampshire,* 414 U.S. 478 (1974).

CONCLUSION

Because the Missouri Pornography Statute is unconstitutional on its face under *Pope v. Illinois,* and because valuable First Amendment interests are at issue, your Petitioner prays this Honorable Court review the judgment and opinion of the Missouri Court of Appeals, Eastern District, declare the Missouri Pornography Statute unconstitutional and void the conviction of Petitioner obtained under it.

Respectfully submitted,

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APPENDIX

APPENDIX A

Chapter 573 — Pornography and Related Offenses

573.010. Chapter Definitions

As used in this chapter

(1) "**Pornographic**", any material or performance is "pornographic" if, considered as a whole, applying contemporary community standards:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It depicts or describes sexual conduct in a patently offensive way; and

(c) It lacks serious literary, artistic, political or scientific value.

In deterining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults;

(2) "**Material**" means anything printed or written, or any picture, drawing, photograph, motion picture film, or pictorial representation, or any statue or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects;

(3) "**Performance**" means any play, motion picture film, dance or exhibition performed before an audience;

(4) **Promote**" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same;

(5) "**Furnish**" means to issue, sell, give, provide, lend, mail, deliver, transfer, circulate, disseminate, present, exhibit or otherwise provide.

(6) "**Wholesale promote**" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purposes of resale;

(7) "**Minor**" means any person under the age of eighteen;

(8) "**Pornographic for minors**", any material or performance is "pornographic for minors, if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) It lacks serious literary, artistic, political, or scientific value for minors;

(9) "**Nudity**" means the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering;

(10) "**Sexual conduct**" means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification;

(11) "**Sexual excitement**" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

(12) "**Sadomasochistic abuse**" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification;

(13) **"Explicit sexual material"** means any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or[1] unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of post-pubertal human genitals; provided however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition;

(14) **"Displays publicly"** means exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others.

(L.1977, S.B.No.60, p. 662, § 1, eff. Jan. 1, 1979.)

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[1] So in original; probably should read "of".

573.030. Promoting pornography in the second degree. —

1. A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he:

(1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; or

(2) Produces, presents, directs or participates in any pornographic performance for pecuniary gain.

2. Promoting pornography in the second degree is a class A misdemeanor.

(L 1977 S.B. 60)
Effective 1-1-79

APPENDIX B

Illinois Obscenity Statute, Ill.Rev.Stat. 1985, ch. 38, ¶11-20 (effective January 1, 1986)

¶ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult

community standards, would find that it depicts or describes, in a penalty offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children, or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.